SUPREME COURT, U. S.

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1970

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WILLIAM EUGENE SHEEHAN, ROBERT LEE SHEEHAN and JOSEPH ANDREW SHEEHAN,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners, William Eugene Sheehan, Robert Lee Sheehan and Joseph Andrew Sheehan, pray that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit rendered in these proceedings on June 8, 1970. A Petition for Rehearing was denied on July 7, 1970.

OPINION BELOW

The opinion of the United States Court of Appeals, as yet unreported, appears at Appendix B, *infra*, pages 21-45.

JURISDICTION

The order denying the petitioners' Petition for a Rehearing was denied by the United States Court of Appeals for the Eighth Circuit on July 7, 1970. This Petition for a Writ of Certiorari was filed less than thirty (30) days from the date aforesaid. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

Petitioners were convicted of multiple counts of violating the mail fraud statute, Title 18, United States Code, Section 1341, after a joint trial as a result of their operations of several hearing aid sales companies. The questions thereby arising are:

1. Whether petitioners were denied their rights to a fair trial and due process of law in a joint trial where the United States Attorney in his supplemental brief to the Court of Appeals stated that it would be at best difficult and probably impossible to indicate specifically which defendant was associated with which company at what time when there were several salesmen involved and many hearing aid companies operated at various times by petitioners individually and with others.

2. Whether petitioners were denied their right to due process of law and a fair trial when in the joint trial most evidence was received only with respect to one petitioner and never connected up with the other petitioners.

3. Whether petitioners were denied their rights to due process of law and a fair trial when all of the evidence supposedly establishing that the petitioners were in a joint and common scheme and artifice to defraud occurred from three to five years before the occurrence of the first count of which they were convicted.

4. Whether the petitioners were deprived of their constitutional right to due process of law and a fair trial when the evidence fails to establish that there was a joint and common scheme and artifice to defraud between and among petitioners.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law * * *.

Title 28, United States Code, Section 1254:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree * * *.

Title 18, United States Code, Section 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF FACTS

The facts relevant to the questions presented by this Petition have not been controverted in detail by the United States. The petitioners have sold hearing aids in the Cedar Rapids, Iowa area for quite some years. The indictment alleges the scheme and artifice from January 1, 1963.

REASONS FOR GRANTING THE WRIT

I. Petitioners Have Been Deprived of Their Liberty Without Due Process of Law Because the Record Does Not Reflect the Participation of Each Appellant During the Period of the Scheme Alleged in the Indictment.

A detailed analysis of the evidence will show that the convictions were based on too much evidence relating to 1959 through 1962. A detailed analysis of the evidence will show that, contrary to what the Court of Appeals concluded, the evidence established that there were separate schemes and that the conviction is in violation of the principles established in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239 (1946).

The indictment alleges that there was one scheme and artifice to defraud. It charged that William and Robert, petitioners, as well as Westberg, were involved in the Transistor Hearing Aid Company. The connection of Robert with Transistor as shown by Exhibit 30-1 was on June 21, 1959, at its latest. William continued with Transistor thereafter. Another petitioner, Joseph, was allegedly connected with Central Iowa Hearing Aid Company, and no evidence identified anyone else with Central Iowa, since September 11, 1961, when Robert was referred to in Government Exhibit 30-2, Appendix page 132. The indictment alleged that Robert and Joseph operated the Electronic Hearing Aid Com-

pany. Government's Exhibit 303, Appendix page 154, indicates that in July, 1962, Joseph was taking over the Electronic Company and was going to drop the name of Central Iowa. On that same page, it is pointed out that on September 6, 1962, Joseph purchased Robert's business, Electronic, was going to drop the name Electronic, and that he would not stand behind any deals made by Robert. That evidence clearly demonstrates that there was no community of interest flowing through the companies between and among the appellants. As petitioner Joseph testified, he and William and Robert were competitive. T. 584.

In paragraph 7 of count 1 of the indictment it was alleged that the defendants exchanged conditional sales contracts for cash by selling to Allied Finance and Dial Finance companies. It is obvious that there was no community of efforts by the defendants. Mr. Wood of Allied Finance dealt only with William in his 160 contracts.

Those contracts were all with the Transistor Company between 1958 and 1964. T. 464, 466. Joseph testified that he never dealt with either company. T. 583. There is no testimony that Robert ever dealt with either company. Those transactions relating to the finance companies were prejudicial to the interests of Joseph and Robert in obtaining a fair trial. The evidence was manifestly prejudicial.

The mailings in certain of the counts were manifestly prejudicial. In Count 4, it was alleged that a mailing went from Joseph Sheehan to Qualitone. There is no tie-in with the other two defendants. In Count 5, there was a mailing from Transistor to Mrs. Jacobs; and the only person involved with her was William. T. 32. In Count 6, there was a mailing from Transistor to Qualitone, and this involved only William. Exhibit 304. Count 7 was a mailing from William Sheehan to Mrs. Jacobs, and no one else was in-

volved in that count. T. 32. Count 8 involved a mailing from Transistor to Eva Randol; and William was involved there with the first sale, Robert with the second, and the references to Westberg are very weak. T. 123, 125. Count 9 involved a mailing from Qualitone to N. Sheehan. As has been pointed out above, the only person involved in mailing to Noah Sheehan were Robert and his wife, Mary. T. 500-501. Count 10 involved another mailing to Noah Sheehan, and that, of course, was prejudicial to William and Joseph. Count 11 was a mailing to Emil Olson, and the only person involved with him was Westberg. T. 261. Westberg was exclusively involved in Count 12, a mailing to George P. Soumas. T. 315. Count 13 is a mailing from Maude Horton to Westberg. Count 14, a mailing to Westberg. Several counts had absolutely no foundation and should not have been received in evidence. They relate to Counts 15, 16 and 17, mailings from Qualitone to Robert and William, to Joseph, and to Joseph Sheehan. See Transcript 118-119. Count 18 involved a mailing from Alice Wine to Transistor Company, and the only defendant involved was William and the testimony on him was weak. T. 330. Count 19 was another mailing to Noah Sheehan.

Exhibits 30-1, 2 and 3 are records of the Better Business Bureau in Des Moines. 30-1 involves primarily the Transistor Company and names William on all of the exhibits and attachments, as they appear in the Court of Appeals Appendix, beginning at page 83. The exceptions are two, in June, 1959, relating to the defendant Robert. Appendix pages 110, 111. Exhibit 30-2 with three exceptions relates exclusively to the Central Iowa Hearing Aid Company and defendant Joseph. The exceptions are one reference to Central Hearing and defendant Robert on September 11, 1961, Appendix page 132, but it has no address on it; two other

references to Robert are in connection with the Electronic Hearing Aid Company, dated May 7 and 17, 1962. Appendix pages 128, 129. This exhibit therefore clearly shows that Joseph was exclusively identified with the Central Iowa Hearing Aid Company with one isolated exception, and Bob was related to the Electronic Company. There is one entry, Appendix page 114, referring to a partnership of Robert and Joseph with the Central Hearing Aid Company in August, 1960. Nowhere else does that appear.

Exhibit 30-3 identifies Robert with the Electronic Company in 1961 and 1962; an entry, Appendix page 154, indicates a call from Joseph to say that he had purchased Robert's business, Electronic, and that Joseph would not use that name but would operate under Central Iowa. Joseph in that note said that Robert is part owner of Transistor but Joseph would not stand behind any agreement made by Robert. On the same page, a note indicated that Joseph called on July 12, 1962, to inform BBB that he was buying the Electronic Company and would drop the name Central Iowa. He said that he would notify his customers and that Robert would be working for him "for a while." In the Appendix, page 153, Robert called on October 5, 1962, and said that he had taken care of all of the people with whom he had dealings but he could not speak for Joe. Thereafter Joseph was identified with the Electronic name through September 4, 1962; Joseph used the name Central Iowa on August 28, 1962; Robert in June and July, 1962, used the name Electronic; Robert is not identified with the name Electronic after July 31, 1962, except for the brief mention quoted above on September 6 and October 5, 1962.

These exhibits themselves demonstrate that there was no common scheme.

Looked at another way, the exhibits show completely sepa-

rate business addresses. These exhibits show that William used the addresses, 549 Euclid and 525 Euclid. Robert used the address 3117 Cambridge exclusively. Robert and Joseph were identified on only one entry, August 19, 1960, at 1825 East Grand Avenue. Robert is identified with 2739 Douglas Avenue between March 29, 1962, and July 31, 1962. Joseph utilized that same address, 2739 Douglas, on August 13, 1962. He also used 2735 Douglas from August, 1962, to May, 1963; 833 Clinton in 1962; 3940 Cornell from August, 1960, to October, 1961; 1925½ East Grand Avenue March, 1961; and 1825½ Grand Avenue in December, 1960.

This disparity in addresses certainly tends to suggest that there is a lack of commonality. Additional evidence demonstrates this beyond peradventure.

Westberg testified for the defense. He said he sold no hearing aids with William, Joseph or Robert. T. 689. He has never had a bank account with any one of them. T. 702. He has received no leads from any one of them. T. 703. When asked whether he was in competition with the defendants, he said, "Well, at the time I don't think that any of them that I know of that were actually selling at that time." T. 703.

The result is that defendant William is identified exclusively with Euclid Avenue addresses; Robert is identified exclusively with Cambridge Avenue address; Joseph is exclusively identified with Cornell address; the Clinton address, 2735 Douglas, 1925½ East Grand, 1825½ East Grand. Robert is identified with 2739 Douglas Avenue in March, April, June and July, 1962. Joseph was there after that. Contemporaneity in addresses is shown only once for Robert and Joseph, at 1825 East Grand. Other than that, everybody operated separately according to the Better Business Bureau.

Many of the persons who testified as purchasers of hearing aids limited their evidence to only one person. They indicated that only one of the persons related to the case sold the hearing aids.

Gooden was the sole salesman to Ralph Stephens. T. 171.

Westberg was the sole salesman to Mrs. Marion Green, T. 240; Mr. and Mrs. Olson, T. 262; Miss Hoagland, T. 317; William Baker, T. 187.

Robert was the only one who dealt with Mrs. Halbrook. T. 141.

William was the only one of the three defendants who dealt with Mrs. Bausum, T. 115; Mrs. Heffelfinger (with Floyd Sheehan), with poor identification, T. 112; Mrs. Hebron, T. 217; Mrs. Wine, with poor identification, T. 330; Mrs. Jacobs, with Nixon, T. 40.

Joseph was the only one who dealt with Mrs. Bamford. T. 289.

There was some interchange. Robert and William apparently dealt with Mrs. Randall. T. 123, 125.

Westberg sold to Mr. Killmer, and, although it was suggested as another salesman, Robert Sheehan was not identified. T. 300. He sold a hearing aid to Mr. Thompson in 1966, although eight years earlier the man had purchased from William. T. 343, 344.

William and Joseph apparently visited Mrs. Fierce together. T. 284.

Joseph and Robert worked in sequence, rather than together, in selling to Mrs. Orr. T. 205. Robert sold to Mr. Thompson in 1959, T. 356, and then to both Joseph and Robert in 1964. T. 363. Robert and Joseph sold to Mr. Widick in April and May, 1962. T. 376, 377.

The consistent individuality of these sales suggests that the method of selling hearing aids was, as visioned by each

of the three defendants here, a sales operation of individual visits and in sequence.

No evidence ties in any meetings, correspondence, admissions against interest, or any other suggestion that the three defendants operated together as a single common scheme during the period covered by the counts.

The absence of such evidence makes prejudicial the evidence, subsequently to be discussed, of the sales tactics by Gooden, Westberg, Lee, Floyd Sheehan, Nixon and McConkey.

The Court of Appeals, at page 17 in the unprinted opinion, stated that,

> During the period between March, 1963 and February, 1964, over $7,000 in checks were written by Mrs. Minnie VerMeer, an 87-year-old lady, payable to Electronic, Stereophonic Sound, Transistor, Iowa Central, Robert Sheehan and Josephine Mary Cipale, Joseph's wife.

There never was any evidence that Mrs. VerMeer was 87 years old. The transcript on cross examination of appellant, Joseph Sheehan, that on page 678 the question, "Mrs. VerMeer was at that time approximately 87 years of age, was she not, Mr. Sheehan?" A. "I don't know how old she was." He conceded that she probably was quite elderly. The evidence does not justify that particular statement nor the statement that "Robert and Joseph were involved with these companies at this time." Opinion, page 17.

What the evidence actually shows is that the exhibits relating to Minnie VerMeer were made payable to a variety of companies. Joseph testified that the Electronic was his trade name. T. 659. There were checks made payable to Electronic, beginning at T. 659, 31-3, 31-4, 31-5, 31-6, 31-7, 31-9, 31-10. Joseph testified that he did not know who owned Stereophonic Sound, T. 662; and checks payable to Stereophonic were 31-8, 31-12, 31-14. Joseph tesfified, and it is un-

rebutted, that he did not recognize Robert's endorsement on checks. T. 664. Checks purporting to be endorsed by him are 31-11, payable to cash, 31-13 payable to Robert, 31-15 payable to Robert, 31-17 payable to Robert and 31-23 payable to Transistor and purportedly, although not proved, endorsed by Robert. Checks payable to Central Iowa were 31-20 and 31-21. The latter purported to be endorsed by Transistor, and this is the only exhibit suggesting an interrelationship. T. 669. Checks to Transistor were 31-22 and 31-16. Two checks were made payable to Joseph's wife, 31-18 and 31-19.

While it is true that Robert and Joseph were involved with these companies, it does not mean that each was related to all of the companies involved; and it does not mean that each appellant was related to the other appellants. This is the test that the Court should force the government to establish; and it never has been established to date.

The Court of Appeals, beginning on the last line of page 17 in the unprinted opinion, stated that, "* * * On January 1, 1963, Mrs. VerMeer gave two $500 checks, one to Transistor and the other to Robert L. Sheehan." This is not correct. As shown by the testimony of Joseph Sheehan relating to the VerMeer checks, T. 659-671, the earliest date of any check was not January 1, 1963, from Mrs. VerMeer, but rather March 20, 1963, Exhibit 31-23. T. 670. This is confirmed by the index to the exhibits for the testimony of that day. T. 645-A, B. Exhibits 31-16 and 31-17 are dated November 1, 1963. Each is for $500; and perhaps the Court had these two checks in mind. Significantly, however, although one check was made payable to Robert and the other to Transistor, the Court neglected to observe that each was endorsed by Robert L. Sheehan. T. 666, 667. No evidence suggests that either one of these checks was meant for someone other than

Robert. Thus, the implicit inference that there was an interconnection or intercommunication between Robert and Joseph and William is unfounded.

The problem that we have is that Mrs. VerMeer did not testify. While the evidence of all of the checks is interesting, we cannot as a matter of law permit the inference that each check was for a hearing aid and that each check was unfairly for a hearing aid, and that each check was indulged in by all appellants as a part of the joint and common scheme to defraud. The government had the responsibility of tieing this together and manifestly failed so to do.

II. Petitioners Were Denied Their Right to a Fair Trial and Due Process of Law Because United States Attorney in His Supplemental Brief to the Court of Appeals Stated That It Would Be at Best Difficult and Probably Impossible to Indicate Specifically Which Defendant Was Associated With Which Company at What Time in Respect to the Joint Trial of the Petitioners.

The indictment in general alleges a scheme to defraud from on or about January 1, 1963 and continuing to the date of the return of the indictment. Of the count letters, the earliest in date is Count XVII and the date is January 2, 1963.

In the supplemental brief of the government, it is stated at page 4 that:

> The details and facts need not all be stated in this portion of the brief, but merely the general statement that if one were to set back after hours of work on this appeal and specifically indicate which defendant was associated with which company at what time and any difference in any respect of the handling of the complaints, sales or in any other matter differently than had been handled by the other company, it would be at best difficult and probably impossible.

It has been our assumption that the government has the responsibility of establishing the details and facts illustrating that each defendant was related to the others during the time of the period of the indictment and more specifically during that time covered by the actual count letters. The government acknowledges that, "* * * It would be at best difficult and probably impossible."

Appellants urge the Court to conclude that if the government is unable to indicate the participation of each appellant, then the record does not show it and, therefore there is an absence of evidence to support the conviction. This is a denial of due process as guaranteed by the Constitution of the United States. *Thompson v. City of Louisville*, 362 U.S. 200, 80 S.Ct. 624, 628 (1960). See also *Trent v. Payton*, U.S.D.C., Virginia, 294 Fed. Supp. 262, 264 (1968).

III. The Law Is Clear That Multiple Schemes to Defraud Resulted in Prejudices to These Petitioners in This Joint Trial.

The Court of Appeals' opinion, Appendix B, pp. 35-38, discusses several authorities in support of the conclusion that there was a single scheme and artifice to defraud. Cited are *Friedman v. United States*, 8th Cir., 347 F.2d 697 (1965); *Pritchard v. United States*, 8th Cir., 386 F.2d 760 (1967); and *Reistroffer v. United States*, 8th Cir., 258 F.2d 379 (1958), cert. denied, 358 U.S. 927 (1959). These authorities do not support the conclusion that the facts in the instant case warrant the inference that there was one common scheme.

In the *Friedman* case, *supra*, it was charged and proved, as pointed out, pages 699 of 347 F.2d, that while there were two dance studios, the appellants had sales meetings at which the appellants directed the dance instructors on the use of coercion, duress, and undue influence, and how their forces

could be exerted on students, and on the further means of selling expensive contracts. They had many instructors who worked at each of the two dance studios, and they took common trips to distant places as a reward for executing the contract. The Court properly concluded, 347 F.2d at 707, that all of the appellants there entered into the scheme knowing about the two studios. That resulted from the proof that many of the instructors worked at each of the two studios, that the sales tactics were instructed by people related to each of the two studios, and that the printed documents giving instructions on how to teach were common to both studios. They had lectures, recitals, photographic reproductions, and written instructions for the operators and instructors. *Ibid.* They had common forms and identical contract terms.

In the *Pritchard* case, *supra*, the evidence shows that Pritchard was the principal owner and operator of the two corporations involved. He attempted to conceal his ownership of one and used a pseudonym. A co-defendant was President of the Nevada Corporation, and another co-defendant was manager in St. Louis. The other defendants were salesmen for the companies. The companies sent out advertisements for the newspapers and magazines with national circulation and the answering correspondence was forwarded to the co-defendants.

The oral misrepresentations tied in to the printed advertisements resulted in sale of expensive franchises. The Court pointed out that each defendant spent considerable time at the principal company offices and assisted in closing deals with other defendants. Further evidence showed that the defendants had individually full knowledge of the nature of the business, 386 F.2d at 761. There was a great deal of evidence showing the interrelationship of the defendants with sales-

men who were involved in the sales and the misrepresentations but not charged as defendants. See 386 F.2d at 767.

In the *Reistroffer* case, *supra*, the salesmen were employed by the co-defendant and had an identical sales pitch which was predicated upon the written advertisements which were sent out to the prospective victims. The proof showed a common plan of sales talk that the salesmen used to induce a sale. This tied in the identity of plan in the common interest. Contrast that with the current situation.

The evidence here separates the three petitioners quite substantially. Contrary to what was assumed by the government and apparently concluded by the Court, the exhibits show a completely separate interest of each appellant in the different companies. The exhibits begin at page 83 of the appendix in the Court of Appeals.

That appendix shows the disconnection between the appellants quite vividly.

William and Transistor Company were connected together during the period of indictment on three exhibits, Exhibit 30-1, Appendix pages 85, 86 and 87. He was identified with Transistor in the period preceding the indictment, on approximately 16 pages. The only time that William and Robert were related together was on June 25, 1959, Appendix, page 109, and that was approximately 3½ years before the beginning of the alleged scheme to defraud.

Robert and Transistor were identified on two occasions in June, 1959. Appendix, pages 110, 111.

Joseph and Contral Iowa Hearing Aid Company were identified in Exhibit 30-2 on certain pages during the period of the indictment. Appendix, pages 116-121. These two were related on approximately 21 pages on dates preceding the period of the scheme alleged in the indictment.

Robert and Electronic were related during the period preceding the indictment only. Exhibit 30-2, Appendix, pp. 128, 129, 153, 155, 156 and 157.

Robert was related to Central Iowa only before the beginning of the indictment period. Exhibit 30-2, Appendix, pages 132-133. This showed that Robert had left Central Iowa Hearing Aid Company and Joseph and had severed his connections with his co-defendant and that company.

Joseph was related to the Electronic Hearing Aid Company only in the period preceding the indictment. Exhibit 30-3, Appendix, page 144.

Robert was related to the Electronic Company before the indictment period. Exhibit 30-3, Appendix, pages 145-148.

The appendix shows Robert and Joseph with the Central Iowa Company three years before the beginning of the indictment time. Exhibit 30-2, August 19, 1960, Appendix, page 141.

The conclusion is inescapable that the evidence did not demonstrate a unified scheme and artifice to defraud during that period covered by the indictment. If the government be correct in saying that it would be "at best difficult and probably impossible" to identify which defendant was associated with which company at what time, then it would appear that the government has conceded that neither the appellants nor this Court can do what it is unable to accomplish. This would be a conviction without the evidenciary basis required for due process of law.

Prejudice may result from proof of multiple schemes. In *Kotteakos v. United States*, 328 U.S. 750 (1946), the government admitted having proved approximately eight conspiracies involving a variety of persons in separate conspiracies through one common person. The Court held that it is error to submit such a case to the jury and it was error for the

Court to instruct that the acts or statements of any of the persons involved may be considered as evidence against all of the defendants who are found to be members of the conspiracy.

CONCLUSION

This Court should isue a writ of certiorari to the Court of Appeals to the Eighth Circuit to review the evidence which the government has conceded cannot be analyzed to determine the specific actions in connection with each petitioner.

Respectfully submitted,

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APPENDIX A

Statutory and Constitutional Provisions Involved

Constitution of the United States, Amendment V:

> No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law * * *.

Title 28, United States Code, Section 1254:

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> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree * * *.

Title 18, United States Code, Section 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,559

UNITED STATES OF AMERICA,

Appellee,

vs.

WILLIAM EUGENE SHEEHAN, ROBERT LEE SHEEHAN, JOSEPH ANDREW SHEEHAN, and LEROY JUNIOR WESTBERG,

Appellants.

Appeal from the United States District Court for the Southern District of Iowa.

(June 8, 1970)

Before BLACKMUN, MEHAFFY and LAY, Circuit Judges.

MEHAFFY, Circuit Judge.

This appeal is from the conviction judgments of William Eugene Sheehan and Robert Lee Sheehan, brothers, and Joseph Andrew Sheehan, their cousin, for having used the mails in a scheme to defraud customers in the sale of hearing aids in violation of 18 U.S.C. §1341.

The three Sheehans and a fourth person, LeRoy Junior Westberg, a former brother-in-law of William and Robert, were indicted by a grand jury on December 21, 1967 on twen-

ty counts of mail fraud. All entered pleas of not guilty but Westberg later changed his plea to guilty on two counts and was sentenced to three years' imprisonment on one of them, given a suspended sentence on the other and placed on three years' probation. He does not appeal. When the Sheehans were tried, the trial judge, The Honorable Roy L. Stephenson, withdrew three counts from the jury's consideration and seventeen counts were submitted to the jury. William and Robert were each convicted on sixteen counts and acquitted on one count, and Joseph was convicted on nine counts and acquitted on seven counts. William and Robert were sentenced by the court to a term of five years' imprisonment and a $1,000.00 fine on Count I and five years' imprisonment and a $1,000.00 fine on each of the other counts, the prison terms to run concurrently, and payment of the $1,000.00 fine on any one count to constitute payment of the fine on all of the counts. Joseph was sentenced to three years' imprisonment and fined $1,000.00 on Count I and received the same sentence and fine on each of the other eight counts, the prison terms to run concurrently and the payment of the fine on Count I to constitute payment of the fine on all counts. We affirm.

The defendants were involved in one or more of four companies at various times, namely, the Transistor Hearing Aid Company, Central Iowa Hearing Aid Center, Electronic Hearing Aid Company, and Stereophonic Sound Company. There was evidence to the effect that in some instances they sold used, recased hearing aids which they represented as new and charged an exorbitant price for them; that they promised free service for varying lengths of time extending up to the life of the customer, but did not provide it satisfactorily; that they claimed to be representatives of various hearing aid manufacturers which they did not represent;

and that they repeatedly sold the same person a different hearing aid (in some instances several times a month or several times a year) on the representation that it was a newer model, or was more powerful, or would work better, when actually it did not, usually taking the previous one in on a trade but charging an exorbitant price for the difference.

Defendants' customers were in the age group from approximately seventy to ninety years, and many of them lived alone. One customer paid over $7,000.00 to two of the defendants and their companies in approximately ten months, and others paid over $2,000.00 and $3,000.00 within a period of two or three years or less.

William Sheehan became the sole owner of Transistor Hearing Aid Company in 1958. Robert and Floyd, his brothers, were salesmen for the company and Joseph, his cousin, was also a salesman there for about a year, beginning in 1959. In 1960, Robert Sheehan and Joseph Sheehan owned and operated Central Iowa Hearing Aid Center for several months. In 1961, Robert purchased Electronic Hearing Aid Company but sold it to Joseph in July, 1962 and acquired Stereophonic Sound.

Original counsel represented defendants during the trial and on appeal until after the original brief was filed. At that time another firm was substituted as counsel for defendants and that firm filed a supplemental brief and made the oral argument before this court. The original brief argued the following points:

I. That the court erred in admitting into evidence Exhibits 30-1, 30-2 and 30-3 and the testimony of Lowell Nicholas relating thereto.

II. That the court erred in admitting into evidence Exhibits 24-7, 24-8 and 24-9 and the testimony of John Widick relating thereto.

III. That the court erred in allowing the jury to find a "scheme and artifice to defraud" from defendants' failure to answer correspondence directed to said defendants by persons containing inquiries concerning hearing aids purchased or the settlement of claims against the defendants.

In addition to the above arguments, present counsel asserted the following in its supplemental brief:

I. That the evidence proves that each defendant and each salesman operated separate from a common scheme to defraud; that this constitutes a fatal variance from the indictment, which alleged a single scheme and artifice to defraud; and that each defendant was materially prejudiced by evidence which was received for consideration by the jury but was demonstrably not admissible against him.

II. That certain other exhibits were improperly received in evidence by the trial court without adequate foundation.

III. That trial and appellate counsel first retained were inadequate.

We find no merit in defendants' first contention that the court erred in admitting into evidence Plaintiffs' Exhibits 30-1, 30-2 and 30-3 and the testimony of Lowell Nicholas, the General Manager of the Better Business Bureau, relating thereto. These were the permanent files of the Bureau pertaining to three of the companies which were owned by and/or which employed defendants at various times during the period involved. Exhibit 30-1 pertains to Transistor Hearing Aid Company, Exhibit 30-2 to Central Iowa Hearing Aid Center and Exhibit 30-3 to Electronic Hearing Aid Company.

Exhibits 30-1, 30-2 and 30-3, as offered, contained the com-

plaints of various customers of defendants which were written to the Better Business Bureau concerning misrepresentations in connection with the sale of hearing aids by defendants, as well as the notification of defendants of the complaints and their responses thereto, but the complaints themselves were not permitted to go to the jury. Defendants objected to the admission of the exhibits on the ground that "they appear to be hearsay as to these defendants" and that they have "no probative value with respect to these three defendants." After a discussion at the bench among the court and counsel, the record reflects the following:

"The Court: Would the government state the purpose of the offer?

"Mr. Williams: Yes, Your Honor. The exhibits are being offered for the purpose of showing that the defendants were advised that complaints were being made about their activities and their business operations, and that they were aware of the complaints that were being made against them. Thus, bearing upon their intent in subsequent transactions.

"The Court: All right. They will be admitted for that purpose. And the Court cautions the jury at this time: I think you recognize that the fact that a complaint is made does not necessarily indicate that the complaint has validity. In other words, the people who made the complaints are not here before the Court to be examined in front of you so you can determine whether the complaints had validity. The only purpose of allowing this evidence to be introduced is for the purpose of showing—as the government has made its offer here—showing that there were complaints made, and what action if any was taken by the defendants. I assume that is covered in the files, is that correct?

"Mr. Williams: Yes, Your Honor.

"The Court: All right. So, Exhibits 30-1, 30-2 and 30-3 are received for that purpose."

At the close of the testimony and prior to the giving of the instructions, the court asked the defendants' attorney and the government's attorneys to look over the files and remove all complaints, since all of the complainants were not present for cross examination but to include the letters from the Better Business Bureau notifying the defendants of the complaints and their responses, if any, thereto.[1]

Photostatic copies of the letters selected by counsel were then made at the court's direction for submission to the jury. The record relevant to this is as follows:

> "The Court: . . . I think, Gentlemen, you agreed that the material from the file in Exhibits 30-1, 2 and 3 that is relevant, would be photostated, and that has been done?
>
> "Mr. Wright: [Defense counsel] That was the agreement between counsel for the defendants and the government.
>
> "Mr. Williams: [Government's attorney] And it is being done now by the clerk of court.
>
> "The Court: I want to say for the record that the Court noted in the file—and I'm not saying that if it

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[1]The trial court's comments are as follows:

"Gentlemen, my instructions are completed. If you gentlemen want to take a look at these records of the Better Business Bureau—you three lawyers—you may bring them to my chambers and look at them. My thought is that that part of the records which might have any bearing whatsoever on the relationship between each of these defendants and LeRoy Westberg, the four of them all told, or lack thereof, is material and relevant to the issues in the case, regardless of whatever else the file might show.

"On the other hand, it is the desire of the Court, and I do want to emphasize to counsel that I do want to remove from the files all complaints, because the Court recognizes that people make complaints, and those people aren't here to be cross-examined. And it is relevant and material that people did make complaints, and those complaints were not answered. And to the extent that some letters might refer to a complaint being forwarded, or some notation about it, I have no desire to have that removed. What I'm trying to get away from is inflammatory type letters that some citizens might have written who were angry about their hearing aids as such . . ."

were relevant and material in some respects that it would necessarily have to be kept out, but the Court felt that the Court should lean over backwards in regard to Exhibits 30-1, 30-2 and 30-3, to see that it should be removed, and not have the jury consider highly inflammatory letters that were in the file.

"Mr. Wright: I believe, Your Honor, you already pointed out that the defendants should have been afforded an opportunity to cross-examine any of the complainants in there; and that was another reason for withdrawing it.

"The Court: That's right. Some of them were repetitions of witnesses who did appear. I glanced through it. Mrs. Wine repeated some of the things on the stand. Well, I think this keeps it in proper balance. There is nothing in there now that doesn't have a strong bearing on the relationship or lack of relationship between the parties; and this is the main purpose for having had these files checked." [2]

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[2] Typical letters appearing in the Better Business Bureau files, taken from Plaintiff's Exhibit 30-1, are as follows:

"June 22, 1959

Mr. Robert L. Sheehan
Transistor Hearing Aid Company
3117 Cambridge
Des Moines, Iowa

Re: Mr. E. H. Miller
Truro, Iowa

Dear Mr. Sheehan:

In reviewing my follow-up file, I note that we haven't had an answer to our letter to you on June 15. [A copy of the complainant's letter was forwarded to Mr. Sheehan with the June 15th letter.]

Would you please give this matter your attention as soon as possible? We'd appreciate it.

Cordially yours,

Better Business Bureau of Des Moines, Inc.
Lowell P. Nicholas
General Manager"

After the jury had left the courtroom to commence deliberations and before the exhibits were submitted to the jury, the following transpired:

"The Court: As to Exihibts 30-1, 30-2 and 30-3, have you gentlemen gone over them?

"Mr. Wright: We have. I have gone over them.

* * * * *

"Mr. Williams: Your Honor, we have examined Plaintiff's Exhibits 30-1, 30-2 and 30-3 and we are agreed that they are in the agreed condition to go to the jury.

"The Court: Is that correct, Mr. Wright?

"Mr. Wright: That's correct, sir."

Furthermore, the jury was again properly and adequately instructed on this point by Instruction 17A given by the court, as follows:

"In this case Mr. Lowell Nicholas, General Manager, Better Business Bureau of Des Moines, testified con-

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"June 25, 1959

Mr. Lowell P. Nicholas
General Manager
Better Business Bureau of Des Moines, Ia.
246 Insurance Exchange Building
Des Moines, Iowa

Dear Mr. Nicholas,

I am sorry that I haven't answered your letter sooner, but the consultant, Robert L. Sheehan was on vacation and I didn't know the particulars on this matter until I talked to him. We will take care of Mr. Miller of Truro, Iowa immediately.

Yours truly,

/s/ William E. Sheehan,
William E. Sheehan,
Transistor Hearing Aid Co. of Iowa.

WS: SB

Inclosed our check for dues.

After follow-up letters of July 15, August 20, August 31, and September 8, 1959, without results or further response, Mr. Nicholas telephoned concerning the complaint and Sheehan told him that one of the brothers who took the order was in California but he admitted liability and said they would repay Mr. Miller's money.

cerning complaints he had received from various customers of the defendants and Hearing Aid Companies, set out in the indictment. His files marked Exhibits 30-1, 30-2 and 30-3, were received in evidence. This testimony and evidence was received for the purpose of showing the relationship or lack of relationship existing between the defendants and the various companies involved. Evidence as to complaints and actions taken thereon is to be considered by you only for what bearing, if any, it may have as to the knowledge, intent, motive or purpose of the defendants, and as to the existence, if any, or lack thereof, of a devised scheme to defraud or to obtain money by means of false or fraudulent pretenses, representations or promises, and for no other purpose."

In *United States v. Press*, 336 F.2d 1003, 1011 (2nd Cir. 1964), the court said that "evidence that there had been complaints which were called to appellants' attention was relevant on the issue of appellants' intent and good faith," and that "the inference might readily be drawn that, since appellants knew that members were being misled by solicitation literature and that there was general dissatisfaction with the manner in which Buy-Rite conducted its affairs, continued operation despite this knowledge showed the existence of a scheme to defraud."[3] The court further stated that testimony concerning the receipt of complaints was admissible irrespective of its truth since the fact of the assertion was itself relevant. See 6 Wigmore, Evidence, §1766 (1940 ed.).

Although defendants contend that there was no showing that they actually knew of some of the complaints, it was clearly shown that they knew of most of them. In *United States v. Press*, *supra*, the defendants contended that there were approximately twenty per cent of the complaints which

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[3]To the same effect, see *Reisfroffer v. United States*, 258 F.2d 379, 388 (8th Cir. 1958), *cert. denied*, 358 U.S. 927 (1959).

had not been called to their attention and that it was error to receive testimony concerning them. The court noted that "there were member complaints in substantial volume which *were* called to Buy-Rite's attention" and held that "because of the prominence of the complaints called to Buy-Rite's attention that were properly in evidence, the fact that there was mention of other complaints not specifically called to Buy-Rite's notice did not constitute error sufficiently prejudicial to demand reversal." Actually, practically all of the letters from Better Business Bureau concerning the complaints were addressed to the personal attention of one of the defendants, and there were eventually acknowledgments to many of them, either by letter or by telephone. Customers testified also concerning many complaints which they had made to defendants personally as well as in writing. It is incredible to suggest that defendants were unaware that there were many complaints concerning the misrepresentations of the hearing aids and their manner of doing business.

Present counsel relies heavily for reversal on *Phillips v. United States*, 356 F.2d 297 (9th Cir. 1965), and *Reisman v. United States*, 409 F.2d 789 (9th Cir. 1969). Both of these cases are readily distinguishable. In the first place, unlike the exhibits here complained of, the exhibits in those cases which were taken from the company's files and admitted into evidence contained numerous complaints, the contents of which were extremely damaging. In the *Reisman* case, hundreds of them were admitted, many were read to the jury, all were sent to the jury room, and the prosecutor urged the jury to examine them and give them weight. In the *Phillips* case, only one letter was read to the jury but the other letters were summarized for the jury and the contents were highly prejudicial. Additionally, some of the defendants in *Phillips* lived in cities other than where the records were

kept and had never seen any of the letter in the file. They were admitted into evidence by the trial court on the theory that the defendants had constructive notice of them, but the court of appeals held that it was error to admit them unless the defendants had actual knowledge of them. The court distinguished *Phillips* from the *Press* decision, *supra*, where it was held that where the defendants had knowledge of approximately eighty per cent of the complaints but no notice of some of the other complaints it was not prejudicial error that they were mentioned in the testimony, stating in *Phillips* the following (356 F.2d at 303-304):

> "But no question appears to have been raised concerning the possibility that not all of the conspirators had seen the complaints. The appellants in that case argued only that the testimony concerning these complaints was hearsay and that some of the complaints concerning which testimony had been received had not been brought to the attention of any of the conspirators. We do not regard Press as authority contrary to our views as expressed above."

In other words, there is a difference between all of the conspirators' not having seen all of the complaints, as in the *Press* case, and some of the conspirators' not having seen any of the complaints, as in *Phillips*. The former situation is present here and we think *Press* controls. Also, in the present case, the complaints themselves which were in the Better Business Bureau file were not sent to the jury, but merely the Bureau's letters notifying them that a complaint had been received from a particular person, usually enclosing a copy thereof, and asking that they attend to the matter and let the Bureau know what action had been taken. The trial court was meticulously careful to see that the highly critical complaints were removed from the file, and defense counsel assisted in doing this. We find no error in the admission of Exhibits 30-1, 30-2 and 30-3.

Defendants' second contention is that they are entitled to reversal because the court erred in admitting into evidence Exhibits 21-7, 21-8 and 21-9 and the testimony of John Widick relating thereto. These were letters which Mr. Widick received from the hearing aid manufacturer to which the Sheehans had sent his hearing aid for repair. When he purchased it for $185.00, they said it had a one-year guarantee. He said "it didn't work at all, hardly," and he sent it back to them within the warranty period for repair. The Sheehans, in turn, sent it to the factory and it came back to Mr. Widick C.O.D., but he refused to pay it. These letters from the manufacturer to Mr. Widick concerning the hearing aid were received in evidence; however, Mr. Widick's testimony to the effect that the company said the guarantee had run out before the Sheehans ever sold it to him was stricken and the jury was instructed to ignore the statement. The record reflects the following:

(John Widick—Direct:)

"A. We wrote to them about it and the company wrote back that the hearing aid—the guarantee was out on the hearing aid before they ever sold it to me.

"Mr. Wright: Now, Your Honor, I'm going to object to the question on the grounds that it's hearsay as to these defendants—correspondence between Mr. Widick and the Minneapolis company. It's irrelevant and incompetent.

"The Court: Yes. That part of the witness' statement that they said that the guarantee was out will be stricken and will be ignored by the jury. It's hearsay as to these defendants."

The government contends that these exhibits go only to the relationship of the manufacturing company and the defendants and also that the impartial immediate response lends to these letters a circumstantial probability of reliability, but even if these letters are considered to have been improp-

erly received, we think their admission is harmless since the court had already instructed the jury to disregard the statement by the company that the guarantee had run out and since the other evidence of guilt was so strong. See *Lowe v. United States*, 389 F.2d 108, 112 (8th Cir. 1968); *Thomas v. United States*, 281 F.2d 132, 136 (8th Cir. 1960); *Homan v. United States*, 279 F.2d 767, 773 (8th Cir. 1960); *Garner v. United States*, 277 F.2d 242, 245 (8th Cir. 1960). See also *Glasser v. United States*, 315 U.S. 60, 67 (1942).

In *Lowe v. United States*, *supra* at 112, this court said:

> ". . . [E]ven if it be assumed that the trial court erred in receiving the objected to testimony . . . a substantial injury to the rights of the accused must appear before a judgment will be reversed for the erroneous admission of evidence. Lutwak v. United States, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953); National Dairy Products Corporation v. United States, 384 F.2d 457 (8th Cir. 1967); Cotton v. United States, 361 F.2d 673 (8th Cir. 1966); Myres v. United States, 171 F.2d 329 (8th Cir.), cert. denied, 338 U.S. 849, 70 S.Ct. 91, 94 L.Ed. 520 (1949); . . ."

There is no direct charge on appeal that the evidence was insufficient for conviction, although it is contended that the evidence shows that each defendant and each salesman operated separate from a common scheme to defraud, which constitutes a fatal variance from the indictment alleging a single scheme and artifice to defraud, and that the evidence against one defendant was not admissible against the others and they were prejudiced thereby. We do not agree. Although the companies maintained offices at different locations and were owned by only one or two of the defendants at the same time, all three worked for Electronic Hearing Aid Company in 1959 when William was the owner and Robert and Joseph were salesmen, and there was a continual change of names and businesses between them, all operating

in the same manner and many times selling to the same customers. Joseph testified that William owned Transistor Hearing Aid Company in 1959, that he worked for him for a year as a salesman, and that at that time Robert and Floyd, another brother of William and Robert, worked there as salesmen. Then Joseph and Robert worked together at another location for three or four months under the name of Central Iowa Hearing Aid Center. Afterwards, Robert operated Electronic Hearing Aid Company from the old Central Iowa location and Joseph worked out of his home under the name of Central Iowa. Later, he and Robert both moved their businesses to another location. The offices seemed to be essentially family operations, other members of the family working for the defendants in secretarial and clerical capacities. After 1962, Joseph was the sole owner of Electronic Hearing Aid Company.

Many times two of the defendants, or one of the defendants and another salesman, called on customers together. Their sales talks and manner of operation were essentially the same. Within a few months, or even days, after making a sale, they would sometimes sell or attempt to sell the customer a different hearing aid, sometimes a used one which they represented as new. They usually took the previously sold hearing aid in on a trade but charged the customer full price or more. They failed to service the hearing aids as promised or guaranteed. One of the defendants would sell a customer a hearing aid and then he or another defendant, representing the same or another company, would call on the customer offering a "better" one. Joseph, the only one of the three who testified, denied that they had any access to each other's prospective customer list, however. Although William and Robert Sheehan did not testify, it was proven by customers who testified that they had received cards, let-

ters and hearing aids from them through the United States mails. Joseph identified an advertising card which he mailed out from Central Iowa Hearing Aid Center to Mr. Widick. It is clear that the mails were used in the advertising and sale of hearing aids and it is equally clear that their sales, particularly their repeat sales, were fraudulent.

During the period between March, 1963 and February, 1964, over $7,000.00 in checks were written by Mrs. Minnie Ver Meer, an 87-year-old lady, payable to Electronic, Stereophonic Sound, Transistor, Iowa Central, Robert Sheehan and Josephine Mary Cipale, Joseph's wife. Robert and Joseph were involved with these companies at this time. Joseph's wife carried a bank account in her maiden name of Cipale to which the checks made out to her in that name were deposited. Joseph admitted that they were married at that time and was unable to satisfactorily explain why her bank account was in her maiden name. These checks ranged from $150.00 to $500.00, many of which were given within a few days of each other, and on January 1, 1963, Mrs. Ver Meer gave two $500.00 checks, one to Transistor and the other to Robert L. Sheehan. It seems reasonable that one good hearing aid could be expected to last throughout this period of ten or eleven months, and any scheme whereby a customer is sold innumerable hearing aids at a cost of over $7,000.00 during that period is ample evidence to sustain a finding that there was a scheme to defraud and that she was, in fact, defrauded out of most of her money. Defendants contend that there is no proof that all of the checks were for hearing aids, but if they were not the evidence is still sufficient to justify an inference that Mrs. Ver Meer was defrauded out of her money.

One of the cases cited by defendants is *Friedman v. United States*, 347 F.2d 697 (8th Cir. 1965), but we think it sup-

ports the government's position rather than the defendants'. It was there contended that there was a fatal variance between the indictment and the proof since the indictment charged a single general over-all scheme involving management and personnel from studios in both Minneapolis and St. Paul, and it was contended that at best the evidence indicated two disconnected and different schemes. The court, however, reached the following conclusion (347 F.2d at 708):

> "We think it well established that there was one over-all scheme to defraud and that this over-all scheme encompassed both the Minneapolis and St. Paul studios. It was not essential to a determination of guilt herein that Lowery should have been instrumental in each operation or in operation out of the St. Paul studios. While Lowery's activities could have been limited to the Minneapolis studio, the jury could well have found, as they undoubtedly did find, that he was aware of what was going on in the St. Paul studios also. In a somewhat similar situation, this court recently said in Koolish v. United States, 8 Cir., 1965, 340 F.2d 513, 525, certiorari denied, 85 S.Ct. 1805:
>
> "'We are fully satisfied from an examination of the tremendous record here that substantial evidence supports the jury finding that there was an over-all conspiracy to defraud and to obtain money and property from the Kenny Foundation and its donors; that each of the appellants cooperated with the others and each knowingly joined in the conspiracy, and that use of the mails to defraud was established in furtherance of the over-all objective. It is immaterial whether or not there were minor conspiracies or schemes inside the over-all conspiracy to obtain money from the Kenny Foundation and and its contributors through false and fraudulent pretenses, representations and promises and that some of the defendants participated in some of these inner or smaller schemes but not in all of them.'"

This is descriptive of the situation here.

Also cited by defendants is *Pritchard v. United States*, 386 F.2d 760 (8th Cir. 1967), to the effect that proof that a particular defendant is a part of the scheme to defraud is essential before any testimony about other persons' actions and statements is received. Further, they call attention to the court's holding that proof of employment of the salesmen standing alone is an insufficient factor for admitting representations made by them to the victim and that there must be some evidence to support a finding of authorization or ratification by the defendants. They contend that under this holding the activities of the other salesmen should not have been admitted, but we disagree. The court held in *Pritchard* that there was adequate circumstantial evidence to support a finding of ratification under facts very similar to the facts here. In this regard the court said (386 F.2d at 767):

> "The representations made by the salesmen were substantially similar to those made by the defendants in similar situations and followed the same pattern. The salesmen were frequently present when defendants made their sales pitches. . . . On other occasions if an inquiry had been made by a prospect, the salesman was sent by the defendants to see the prospect and attempt to make the sale. . . . In a number of instances, the victims, after talking with a salesman, conferred with one or more of the defendants prior to entering into a contract and in such conversations, the representations made by the salesman were confirmed.
>
> "In any event, the negotiations with respect to many of the victims were handled directly by one or more of the defendants and the sentences imposed can be supported by convictions on counts in which there was no material participation of any nondefendant salesman. No prejudicial error was committed in the circumstances of this case in admitting the victims' testimony as to the salesmen's representations."

The same is true in the instant case.

Another case cited by defendants is *Reistroffer v. United States*, 258 F.2d 379 (8th Cir. 1958), *cert. denied*, 358 U.S. 927 (1959), but it also supports the action of the trial judge. *Reistroffer* was a unanimous opinion of this court. There objections were made throughout the trial to testimony of customers concerning the sales talk of the defendants, charging that it was hearsay as to all or nearly all of the defendants on trial and, therefore, inadmissible as to them, and that if it should nonetheless be admitted, a limiting instruction should be immediately given to the effect that the jury should not consider it unless the scheme to defraud was proved as charged and that the proffered matter was proved to be in furtherance thereof. The court overruled the objection after being assured by the prosecutor that he had evidence to connect up the testimony to be elicited from the witness with the alleged scheme to defraud, and stated that complete instructions would be given later. We quoted the trial court's statement refusing to limit the testimony to a particular defendant as follows (258 F.2d at 387):

> "'. . . The Court refuses to limit it to this specific defendant. * * * I might state my position: That under the common plan, scheme and design they may offer their proof in support of the charge. Whether it is sufficient that will be for the Court or jury to decide afterwards. Under the circumstances we have a different situation. * * * 3-A may be received. You may read this to the jury.'"

Commenting on the trial court's action, this court said (258 F.2d at 387):

> "We find no error in the course followed by the Court. Where the scheme to defraud included making sales by means of certain false representations conveyed through salesmen, proof of the same misrepresentations being made at widely different places to different persons by numerous agents in the same period, tends to prove that

the scheme existed and that the particular salesman was carrying it on. As in the case of a conspiracy in operation the acts and declarations of each participant are admissible against all."

At page 388 we cited numerous cases to support our position that the testimony of the purchasers concerning their conversations with the salesmen were admissible upon the conditions prescribed by the court.

Instruction 18 correctly instructed the jury on this point, as follows:

"In the present case the Government has presented evidence as to statements made in the absence of the different defendants. Before you may consider such evidence as to any defendant, you must first find that the Government has by evidence apart from such statements established beyond a reasonable doubt (1) that the particular defendant and the person or persons making the statement or statements had knowingly and intentionally participated in devising the scheme described in the indictment, and (2) that the statement or statements were made pursuant to such scheme and in furtherance thereof.

"If the Government as to a particular defendant has so established both (1) and (2), you may consider such evidence in passing upon the guilt of such defendant and give it such weight as you feel it is justly entitled to.

"If the Government has not so established both (1) and (2), then you should reject such evidence and give it no consideration in passing upon the guilt of such defendant.

"The foregoing instruction relates only to evidence as to statements made in the absence of a particular defendant. It does not relate to evidence as to statements made by such defendant or in his presence. Evidence as to the statements made by a particular defendant or in his presence may be considered by you in passing upon the guilt of such defendant even though the Government has not established (1) and (2) above set forth beyond a reasonable doubt."

In the *Reistroffer* case, *supra*, the defendants also asserted that although the indictment charged only one scheme to defraud there were under the proof three possible schemes and that there was consequently a fatal variance. They made no claim of variance at the conclusion of the government's evidence, but included a general charge of variance in the motions for acquittal at the end of the evidence. Answering this charge, Judge Woodrough, speaking for this court, said (258 F.2d at 393):

> "It is true that in this case there was proof that defendants sold several different kinds of vending machines; that they used two different corporate names; that defendant Reistroffer went under different names; that a product called Bru Coffee they sold for use in the coffee machines was unfit; and that many different misrepresentations were made to effect sales. But we find no scheme proven that was segregated and unrelated to the general inclusive scheme charged in the indictment fraudulently carried on by repeating the same steps of procedure and actively participated in by all of these appellants.
>
> "The reliance of the appellants in respect to their claim of variance is largely upon Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557. That was a conspiracy case where the convictions were under a single general conspiracy charged. But the government admitted that the evidence proved some eight or more different ones of the same sort, connected only because they were executed through a key man common to all. Different persons seeking to obtain money by fraud from the government obtained his help at different times but independently of each other. The Supreme Court reversed the convictions on account of the variance and the resultant unfairness of the trial as to individuals.
>
> "In this case the scheme as charged and proved was sufficiently unitary so that each of these appellants was connected with and bound by the proof that was offered and received against them or either of them. They all participated in the common scheme to sell vending ma-

chines and products to be sold therein. Neither of them is entitled to reversal on account of any variance between the charge and the proof or on account of alleged error in the instructions given by the court and not excepted to at the time."

The facts here are strikingly similar to the facts in the *Reistroffer* case, and we adhere to the views which we expressed there.

Defendants also complain of the admission of Plaintiff's Exhibits 1-1 through 1-9, which were photostatic copies of the registration of various trade names by the defendants. Applicants were Joseph Sheehan for Central Iowa Hearing Aid Center and Electronic Hearing Aid Company; Robert Sheehan for Stereophonic Sound Company and Transistor Hearing Aid Company; and William and Floyd Sheehan for Transistor Hearing Aid Company. These were exhibits to the testimony of Virgil Robert Pinegar, Second Deputy in the Polk County Recorder's Office, and bore his signature on the reverse side thereof attesting to the fact that they were authentic copies of the original records in the Recorder's Office. He also testified verbally as to their authenticity.[1]

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[1] With regard to Plaintiff's Exhibit 1-1, Mr. Pinegar testified as follows:

"Q. . . . Now on the reverse of that exhibit, Mr. Pinegar, I believe you'll find your signature.

"A. Yes, sir.

"Q. And for what purpose is your signature on that document?

"A. When we make a certified copy, it must be signed by one of the deputies.

"Q. Is Exhibit 1-1 a certified copy of a record of the Recorder's office?

"A. Yes, sir.

"Q. And are the original records of which Exhibit 1-1 is a certified copy, a part of the records that are made and kept in the regular and ordinary course of operating the business of the Polk County Recorder's Office?

"A. Yes, sir. The original copy is kept there on record forever."

A similar identification was made by Mr. Pinegar of the other Exhibits 1-2 through 1-9, and in each instance he testified that they were authentic copies of the original records on file in the Recorder's Office.

Rule 44(a)(1), Fed. R. Civ. P., 28 U.S.C.A., which was made applicable to criminal proceedings by Rule 27, Fed. R. Crim. P., 18 U.S.C.A., provides that a copy of an official record is admissible when "attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody." It further provides that "the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office." The court ruled that these were certified copies of original records and were admissible under appropriate statutes and rules of the court. Defendants now complain that these exhibits were not accompanied by proper certificates, but no objection was made on this ground at the time of their introduction. We find no merit to their belated objection. Certainly no prejudice could have resulted since the evidences which the exhibits contained was cumulative to other evidence in the record. Not only did Pinegar testify concerning the same facts, but other witnesses, including Joseph Sheehan, testified concerning the ownership and operation by the defendants of companies under the various trade names.

Defendants did make a timely objection, however, that no proper foundation was laid because the Deputy who testified was not employed at the Recorder's Office at the time all of the records were entered; but this is not required. There would be few records for which a proper foundation could be laid if all those who had played a part in entering them of record had to testify and identify them.

Defendants also attack the admission of the photostatic

copies on the ground that the originals would have been the best evidence and claim therefore that the Best Evidence Rule has been violated. As was said in *United States v. Manton*, 107 F.2d 834, 845 (2nd Cir. 1939), *cert. denied*, 309 U.S. 664 (1939), "if it appear, as it does here, that what is called the secondary evidence is clearly equal in probative value to what is called the primary proof, and that fraud or imposition, reasonably, is not to be feared, the reason upon which the best evidence rule rests ceases. . . ." Furthermore, the admissibility of secondary evidence is within the broad discretion of the trial judge. *United States v. Corello*, 410 F.2d 536, 543 (2nd Cir. 1969). It is not contended that the copies are fraudulent and since no prejudice resulted from their admission, there was no abuse of discretion on the part of the court in admitting them.

Defendants were each convicted on Count I, and since each received sentences and fines on his convictions on the other counts concurrent with the sentence and fine on Count I, all this court need decide is whether the conviction on Count I is good, and we hold that it is. "Firmly embedded in federal jurisprudence is the principle that a general sentence on several counts of an indictment will be sustained on appeal if the defendant was properly convicted under any count which is good and which is sufficient in itself to support the judgment and sentence." *Pritchard v. United States*, *supra*, 386 F.2d at 763-764. To the same effect, see *Barenblatt v. United States*, 360 U.S. 109, 115 (1959); *Lawn v. United States*, 355 U.S. 339, 359 (1958); *Sachs v. United States*, 412 F.2d 357, 360-361 (8th Cir. 1969); *Isaacs v. United States*, 301 F.2d 706, 733 (8th Cir. 1962).[5]

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[5]See, however, *Benton v. Maryland*, 395 U.S. 784, 788-793 (1969), where the concurrent sentence doctrine was criticized.

Finally, the defendants contend that original counsel whom they retained was so inadequate that their constitutional rights were violated in that they were denied effective assistance of counsel and were convicted on evidence so meager that it amounted to a denial of due process. We cannot agree. They were represented by an attorney of their own choosing, who was obviously experienced. Although he did not object to the admission of as much evidence as their present attorneys would have liked, he did make numerous objections throughout the trial, and we cannot say that his failure to object at other times was due to incompetence. It could well have been the attorney's strategy to avoid objecting as much as possible in order to keep from giving the members of the jury the idea that he was trying to cover up something or keep them from getting all of the facts. It is not always in the best interest of a client for his attorney to continuously object to the admission of evidence, even though in some instances he may have valid grounds for objection.

Although there was some hearsay evidence admitted, it was not sufficient to prejudice the defendants. As hereinbefore stated, if there is sufficient evidence to sustain the conviction on any one count we must affirm since concurrent sentences and fines were given on all of the counts.

A defendant is not guaranteed "effective" counsel. Certainly, the fact that a defendant did not win his case is no reason in itself on which to base a charge that counsel was incompetent. The Sixth Amendment does not require for its satisfaction that the actions of counsel result in a favorable outcome. *Meyer v. United States*, ___ F.2d ___ (8th Cir., No. 19,678, April 20, 1970); *Kress v. United States*, 411 F.2d 16, 22 (8th Cir. 1969); *Evans v. United States*, 346 F.2d 512, 514 (8th Cir. 1965); *Taylor v. United States*, 282 F.2d 16, 20 (8th Cir. 1960).

The evidence in this case is strongly indicative of each defendant's guilt of a common and unitary scheme to defraud. We have carefully studied the appendix, transcript and record, and conclude that no evidence of any prejudicial nature was submitted to the jury; that there is no fatal variance between the evidence and the indictment; that at all stages of the trial and appeal defendants were represented by competent and adequate counsel of their own choice; and that in every long, hard-fought and complex case such as this strong argument can be made that in isolation some testimony should have been excluded or that trial tactics employed might not have been most beneficial. We are convinced, however, that a fair trial ensued here and that the learned and experienced trial judge was most meticulous in protecting defendants' every right. We are also convinced that our conclusion comports with the many decisions of this court, with those of other circuits and the Supreme Court.

For these reasons, the conviction judgments are affirmed.

SUPREME COURT, U. S.

In the Supreme Court of the United States

October Term, 1970

No. 70-

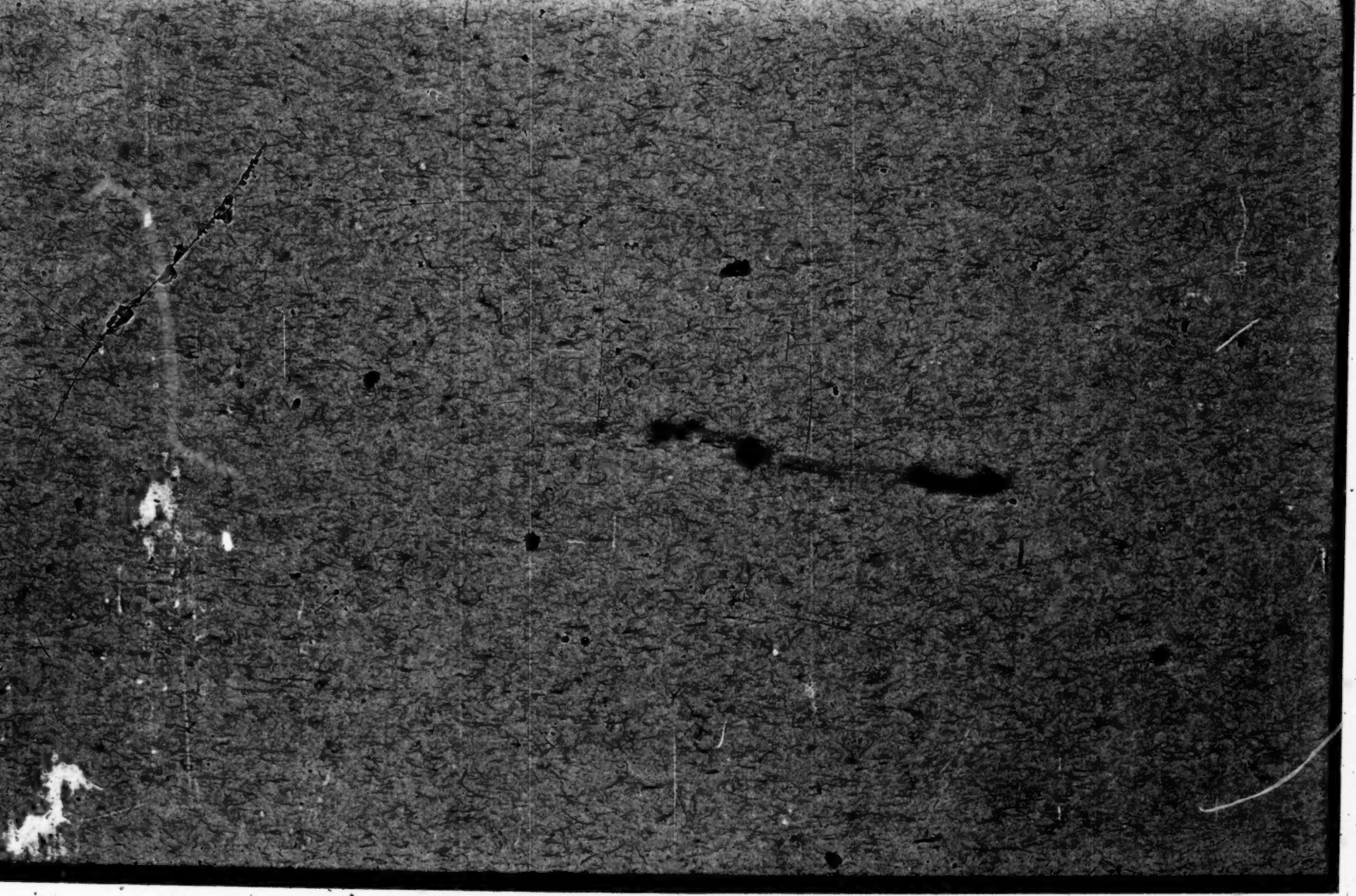
WILLIAM HOWARD SCHWARTZ, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR THE UNITED STATES IN OPPOSITION



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 502

WILLIAM EUGENE SHEEHAN, ROBERT LEE SHEEHAN AND JOSEPH ANDREW SHEEHAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A twenty-count indictment returned in the United States District Court for the Southern District of Iowa charged petitioners and Leroy Junior Westberg with having used the mails in a scheme to defraud customers in the sale of hearing aids in violation of 18 U.S.C. 1341 (App. 2–15).[1] After a jury trial William Sheehan and Robert Sheehan were found guilty on sixteen counts and acquitted on one count.[2] On Novem-

[1] "App." refers to the Appendix in the court of appeals which is on file with this Court.

[2] The trial court withdrew three of the counts before submission to the jury (App. 51, 61–62); Westberg entered a guilty plea prior to trial (App. 63), was sentenced to three years' imprisonment, and did not appeal (Pet. App. 22).

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ber 15, 1968, they were sentenced to five-year concurrent terms of imprisonment and each fined $1,000 (App. 80–82). Joseph Sheehan was found guilty on nine counts, sentenced to concurrent terms of imprisonment for three years, and ordered to pay a $1,000 fine (App. 82–83). On appeal the convictions were affirmed (Pet. App. 21–45).

As the court of appeals pointed out in its comprehensive opinion (see Pet. App. 22, 33), at various times in the consummation of their scheme to sell hearing aids, each petitioner was involved as an owner or employee in one or more of four companies: the Transistor Hearing Aid Company, Central Iowa Hearing Aid Center, Electronic Hearing Aid Company, and Stereophonic Sound Company. (See App. 20, 21, 25, 26–27, 29, 30, 154; Pet. App. 22, 33). On many occasions petitioners either singly, or two at a time, or accompanied by a salesman, called on customers (Pet. App. 34; App. 36–38). In some transactions petitioners sold used, recased hearing aids which they represented as new, and charged exorbitant prices; they promised free service for varying lengths of time extending up to the life of the customer, but did not provide it satisfactorily; they claimed to be representatives of various hearing-aid manufacturers which they did not represent; they repeatedly sold the same person a different hearing aid on the representation that it was a newer model, or was more powerful, or would work better, when actually it did not, usually taking the previous hearing aid as trade and charging an excesive price for the difference (Pet. App. 22–23).

The essence of petitioners' argument is that, although the indictment alleged one common scheme to defraud, the evidence showed multiple, separate schemes. The court below, on whose opinion we basically rely, found otherwise.

The fact that there was a continuing change of names and businesses at different addresses did not alter in any significant manner the fact that petitioners operated together to sell defective hearing aids by means of fraudulent representations. The unitary nature of the scheme was not changed because each petitioner did not participate in each sale. Contrast *Blumenthal* v. *United States*, 332 U.S. 539, 558–559, which is here controlling, with *Kotteakos* v. *United States*, 328 U.S. 750, upon which petitioners improperly rely (Pet. 16). See also *Reistroffer* v. *United States*, 258 F. 2d 379, 393–394 (C.A. 8), certiorari denied, 358 U.S. 927 (unitary mail fraud scheme in sale of vending machines); *Friedman* v. *United States*, 347 F. 2d 697, 708 (C.A. 8), certiorari denied, 382 U.S. 946 (single scheme in operation of dance studios in two different cities).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

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